April 20, 2016

The Honorable Del Marsh
Alabama Legislature
11 South Union Street
Suite 722
Montgomery, AL 36130

The Honorable Arthur Orr
Alabama Legislature
11 South Union Street
Suite 730
Montgomery, AL 36130

Re: Analysis of S.B. 356 (Constitutional Amendment to Regulate Political Contributions and Spending)

Dear President Pro Tempore Marsh, Senator Orr, and members of the Senate:

On behalf of the Center for Competitive Politics ("CCP" or the "Center"),[1] we respectfully submit the following comments analyzing S.B. 356, as amended by the Senate Constitution, Ethics and Elections Committee on March 23. The bill would refer to the voters a proposed ballot measure to adopt an amendment to the Alabama Constitution purporting to create a new "right that money used to fund campaign activity and to influence governmental action be disclosed publicly . . . ."[2]

On its face, the amendment appears innocuous enough. Upon closer inspection, however, the proposal would force the Legislature to regulate useful civic activities and greatly harm public debate and information. It would put the Alabama Constitution in direct conflict with the First Amendment to the U.S. Constitution and with core democratic values.

Instead of working to improve Alabama government, citizens will be forced to track their activities "to influence governmental action" and report these activities to the government, a stunning invasion of privacy and a profound waste of time that will make filing tax returns look simple by comparison. The measure looks like something Vladimir Putin might want to adopt in Russia.

Here are just a few of the harmful impacts that would come from such an amendment:

[1] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Delaware and Utah. We are also involved in litigation against the state of California.

[2] Ala. S.B. 356 (2016 Reg. Sess., as reported to Senate) § 1; *see also id.* § 3 ("requir[ing] the state to regulate the disclosure of the raising and spending of money to influence elections and referenda").

- The Legislature could require the news media to report its spending on any opinion articles and could also regulate news coverage in general.
- Public relations firms could be required to register and report their spending (don't laugh; New York's Joint Commission on Public Ethics already issued a ruling requiring such firms to register and report their spending).
- Groups of citizens or even a husband and wife who travel to visit the Capitol and talk to legislators or public officials could have to track and report these activities.
- Bloggers could be forced to file reports on their activities to influence campaigns or governmental action too.
- By creating a new "right" in the state Constitution, the measure might create a potent tool that could be used by lawyers to target political opponents with lawsuits, subpoenas and depositions, driving people away from speaking about government policies.[3]

Not only is the language in the measure dangerous, it is completely unnecessary. Alabama's government already has a right to regulate campaigns and lobbying, but must do so in conformance with the federal and state constitutions.

I. Alabama already regulates campaign contributions and spending and lobbying.

To the extent S.B. 356 is not intended to undermine core First Amendment rights – as discussed in more detail below – the proposed constitutional amendment is gratuitous and would give a misimpression of state law to Alabama voters. S.B. 356 proposes to amend the state constitution to require the Legislature to "regulate the disclosure, raising, and spending of money to influence elections and referenda," as if Alabama law does not already do this.

Existing Alabama law already regulates the disclosure of campaign spending by:

- Requiring entities to register and report as political action committees ("PACs") when they "anticipate[] either receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding [$1,000]";[4]
- Requiring PACs to file annual, monthly, weekly, and even daily reports;[5] and
- Requiring PACs to publicly identify all contributors who have given more than $100 during the calendar year to the PAC.[6]

    - These PAC disclosure requirements also apply to sponsors of so-called "electioneering communications."[7]
    - These PAC disclosure requirements purport to apply to any entity sponsoring independent expenditures in connection with Alabama state elections exceeding

[3] The proposed amendment, if enacted by the voters, would be codified as Section 36.05 of the Alabama Constitution, under the state's "Declaration of Rights." Ala. S.B. 356 (2016 Reg. Sess., as reported to Senate) § 1.
[4] Ala. Code § 17-5-5(a).
[5] *Id.* §§ 17-5-8.
[6] *Id.* § 17-5-8(c)(2).
[7] *Id.* § 17-5-8(h).

$1,000, regardless of whether influencing Alabama state elections is the entity's major purpose.[8]

In addition to these disclosure requirements, existing Alabama law further regulates the raising of money to influence elections by generally prohibiting candidates for legislative and statewide office from:

- Accepting contributions outside of the twelve months immediately preceding their elections or, for the purposes of debt retirement, in the 120 days immediately following their elections;[9] and
- Accepting contributions while the Legislature is in regular or special session.[10]

On top of these disclosure and fundraising requirements and prohibitions, existing Alabama law further regulates the spending of money to influence elections by:

- Regulating all spending "made for the purpose of influencing the result of an election" – including any "constitutional amendment or other proposition [that] is submitted to the popular vote" – as campaign "expenditures";[11]
- Prohibiting spending on "paid political advertisements," "electioneering communications," and printed materials "relating to or concerning an election," unless they are accompanied by certain disclaimers;[12] and
- Limiting what candidates may spend their campaign funds on.[13]

As this very high-level overview makes clear, Alabama's existing campaign finance laws already "regulate the disclosure, raising, and spending of money to influence elections and referenda," and the proposed constitutional amendment is wholly unnecessary. Although the Center does not advocate for additional campaign finance regulations, we note that, if the Legislature were to determine that Alabama's existing laws in this area are insufficient, the Legislature could certainly amend or supplement these laws, provided that it does so within the bounds of Section 4 of the Alabama Constitution, the First Amendment of the U.S. Constitution, and relevant state and federal court rulings. The very existence of these current laws, however, and the lack of any legal authority that we know of calling into question the general validity of these laws, is proof positive that the existing state Constitution does not need to be cluttered with the additional proposed verbiage in S.B. 356 in order for the Legislature to continue regulating in this area.

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[8] Ala. Att'y Gen. Op. 2000-028. Alabama's regulation of independent expenditures and electioneering communications in this manner is likely unconstitutional. *See, e.g.*, *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014) (holding that Wisconsin's regulation imposing political committee-like registration, reporting, and other requirements on all organizations that made independent disbursements was unconstitutional as applied to organizations not engaged in express advocacy as their major purpose); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 596–98 (8th Cir. 2013) (striking down Iowa's independent expenditure regulation on the same grounds); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873–74 (8th Cir. 2012) (*en banc*) (striking down Minnesota's independent expenditure law on the same grounds).

[9] Ala. Code § 17-5-7(b)(2).

[10] *Id.*

[11] Ala. Code § 17-5-2(5) and (7)a.1.

[12] *Id.* §§ 17-5-12(a) and -13.

[13] *Id.* § 17-5-7(a).

Of note, S.B. 356 also apparently still refers, in part, to activities that "influence [] governmental actions," even after the Senate Constitution, Ethics and Elections Committee amended the bill on March 23.[14] Alabama law already contains extensive registration and disclosure requirements for lobbying.[15]

Relatedly, by implying that Alabama law does not already "regulate the disclosure, raising, and spending of money to influence elections and referenda" and "governmental actions," the proposed constitutional amendment would perpetuate the very problem that the Legislature just recently sought to address. In sponsoring the law now codified at Ala. Stat. § 17-6-81, which provides for a state Fair Ballot Commission, State Rep. Steve McMillan stated, "[v]oters should not have to wade through . . . misleading ballot language in order to determine their vote on a constitutional amendment."[16] S.B. 356 is a poster child for precisely this type of "misleading ballot language."

II. S.B. 356 would put the Alabama Constitution in direct conflict with itself, with the U.S. Constitution, and with core democratic values.

Legislators have a duty to examine exactly what it is that this proposal is intended to accomplish that existing Alabama law does not already accomplish, or is incapable of accomplishing under the existing strictures imposed by the state Constitution. If the proposal's preambulatory clause is any indication of its effects, the proposal, if enacted by the voters, would put the state Constitution in conflict with itself, the U.S. Constitution, and core democratic values.

Specifically, S.B. 356 purports "[t]o advance democratic self-government and political equality, and to protect the integrity of government and the electoral process . . . ."[17] As a preliminary matter, we note that S.B. 356's preambulatory language is identical to the preambulatory language in the proposal to amend the U.S. Constitution sponsored by U.S. Senator Tom Udall of New Mexico.[18] By the admission of Senator Udall's own office, that proposal – which received no bipartisan support whatsoever in Washington[19] – was an attempt to circumvent key U.S. Supreme Court rulings on the extent to which the government may regulate political speech under the First Amendment of the U.S. Constitution.[20]

The preambulatory language about "political equality" used in both S.B. 356 and the Udall Amendment may sound innocuous enough at first blush, but let us be perfectly clear: "Political equality" in the context of campaign finance regulation does not have the same meaning as it does

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[14] *See* note 2, *supra*.
[15] Ala. Code § 36-25-1 *et seq*.
[16] "Press Release: Informed Voter Act," Alabama House Republicans. Retrieved on April 20, 2016. Available at: http://alhousegop.com/2013/01/29/press-release-informed-voter-act/ (January 29, 2013).
[17] Ala. S.B. 356 (2016 Reg. Sess., as reported to Senate) § 1.
[18] *Compare id. with* S.J. Res. 19 (113th Cong., as reported to Senate; *hereinafter*, the "Udall Amendment") § 1. A compendium of information and analysis on the Udall Amendment is available at http://www.campaignfreedom.org/firstfreedom/.
[19] *See* "Cosponsors," S.J. Res. 19 (113th Cong.). Retrieved on April 20, 2016. Available at: https://www.congress.gov/bill/113th-congress/senate-joint-resolution/19/cosponsors?q={%22search%22%3A[%22\%22s.j.+res.+19\%22%22]} (July 30, 2014).
[20] "Press Release: Udall Constitutional Amendment on Campaign Finance to get Senate Floor Vote," Office of Senator Tom Udall. Retrieved on April 20, 2016. Available at: http://www.tomudall.senate.gov/?p=press_release&id=1637 (April 30, 2014) ("Udall introduced his constitutional amendment, S.J. Res. 19, last June to reverse the [U.S. Supreme] Court's 1976 *Buckley v. Valeo* decision . . . .").

in the context of voting rights. All American citizens have a Constitutional right to "political equality" under the principle of "one person one vote."[21] However, as the U.S. Supreme Court has recognized time and time again over the past forty years, in the area of campaign finance laws:

- "'equalizing the relative financial resources of candidates competing for elective office' . . . [is] 'clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights'";[22]
- "We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech";[23] and
- "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[24]

The preambulatory language about "protect[ing] the integrity of government and the electoral process" is similarly suspect. Notably, the proposal does not use the accepted rationale of preventing "corruption or the appearance of corruption" – the standard the U.S. Supreme Court has recognized as the permissible justification for campaign finance laws.[25]

Taken together, these vague platitudes in S.B. 356 would invite the enactment of laws discriminating amongst persons or entities that have differing levels of "influence" over voters or politicians or "access" to public officials as determined by public perception, political favoritism, or mere legislative whim. As the U.S. Supreme Court has held, "the Government may not seek to limit the appearance of mere influence or access."[26] Under the name of "political equality" and "protect[ing] the integrity of government and the electoral process," however, all manner of invidious legislation may be enacted, including but not limited to the following:

- Corporations, but not unions, may be prohibited from contributing to candidates (or vice versa);
- Nonprofit corporations like the National Rifle Association or the Sierra Club may be banned from mentioning candidates for office when discussing Second Amendment or environmental issues;
- Candidates running against each other for the same office may be subjected to different contribution limits;
- Because the proposal fails to include a press exemption:
    - Certain political commentators or news sources may be muzzled because they are determined to have "excessive influence" over the electorate or espouse objectionable views;
    - The government may query and regulate news organizations with respect to how they determine which stories relating to political issues or events to cover, how such stories are covered, and how much prominence to give to each such story; and

[21] *Baker v. Carr*, 369 U.S. 186 (1962). *See also, e.g., Evenwell v. Abbott*, slip op. (Sup. Ct. Apr. 4, 2016).
[22] *Davis v. FEC*, 554 U.S. 734, 738 (2008) (quoting *Buckley v. Valeo*, 424 U.S.1, 54 (1976)).
[23] *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011).
[24] *Buckley*, 424 U.S. at 48-49.
[25] *See, e.g. McCutcheon v. FEC*, 134 S. Ct. 1434, 1450-1451 (2014).
[26] *Id.* at 1451.

- News media outlets may be required to disclose their sources of revenues and expenditures as a consequence of their coverage of elections.

Requiring campaign finance laws to be based on hard evidence of corruption helps prevent such legislative mischief; an "integrity" or "political equality" standard does not. To the extent that any political system devised by imperfect human beings is imperfect, attempting to legislate political "equality" will inevitably create a system in which "All animals are equal, but some animals are more equal than others."[27]

III. S.B. 356 would require passage of intrusive and complex "lobbying" laws that would invade privacy and stifle useful debate.

As noted earlier, the proposed amendment would create "a right that money used to … influence governmental action be disclosed."

Of course, money is commonly spent by many people and organizations to "influence governmental action." The measure provides no exemptions from its disclosure requirements, which could lead to many unanticipated consequences.

To give just one example from New York State, earlier this year the state ethics commission published a binding opinion that "a public relations consultant who contacts a media outlet in an attempt to get it to advance the client's message in an editorial would also be delivering a message" that would trigger the state's lobbying registration and reporting requirements. This new ruling is now being litigated in federal court, and the Center's Legal Director is co-counsel in the litigation.

Many other actions that influence governmental action also require the expenditure of money and would appear to trigger new reporting requirements. Editorials influence governmental action, but so do news reports. Even school trips to the state capitol have impact and would appear to require disclosure.

* * *

For the reasons discussed above, many aspects of this measure are repugnant to the First Amendment of the U.S. Constitution. While states have broad rights to enact laws that are not expressly prohibited or delegated to the federal government,[28] they are not free to override the First Amendment,[29] or to disregard the holdings of the U.S. Supreme Court.[30] Moreover, Article I, Section 4 of the Alabama Constitution guarantees the state's citizens the same speech rights as does the First Amendment.[31] Thus, the constitutional amendment proposed by S.B. 356, if enacted by the voters, also would put the state's Constitution in conflict with itself.

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[27] George Orwell, Animal Farm (1945).
[28] U.S. Const., 10th Amend.
[29] *Id.* Art. VI; *see also, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").
[30] *See, e.g., Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012).
[31] *See, e.g., J.C. v. WALA-TV*, 675 So. 2d 360, 362 (Ala. 1996) (stating that Art. I, § 4 of the Alabama Constitution is "[i]n accord with the First Amendment to the United States Constitution"); *McKinney v. City of Birmingham*, 292 Ala. 726, 728 (1974) (J. Jones dissenting) (stating that Art. I, § 4 of the Alabama Constitution is "analogous" to the First Amendment of the U.S. Constitution).

Thank you for considering the Center's analysis of Senate Bill 356. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact CCP's Director of External Relations, Matt Nese, at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,

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